

ASSEMBLY BILL

No. 987

Introduced by Assembly Member Levine

February 26, 2015

An act to amend Section 12940 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 987, as introduced, Levine. Employment discrimination, unlawful employment practices.

Existing law, the California Fair Employment and Housing Act, protects and safeguards the right and opportunity of all persons to seek, obtain, and hold employment without discrimination, abridgment, or harassment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

Existing law, requires an employer or other entity covered by the act to provide reasonable accommodation of, among other things, a person's disability and religious beliefs and prohibits discrimination against any person because the person has opposed any practices forbidden under the act or because the person has filed a complaint.

This bill would, in addition, prohibit an employer or other covered entity from retaliating or otherwise discriminating against a person for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted. The bill would make related findings and declarations.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares the following:

(a) A request for reasonable accommodation based on religion or disability constitutes protected activity under Government Code Section 12940, such that when a person makes such a request, he or she is protected against retaliation for making the request.

(b) The Legislature recognizes that federal law affords similar protection to a person making such a request, as articulated by the Equal Employment Opportunity Commission in its interpretative guidance of the Americans with Disability Act of 1990 (Public Law 101-336) and Title VII of the Civil Rights Act of 1964 (Public Law 88-352, as amended). The Legislature affirms that the federal acts provide a floor of protection and that this state's law has always exceeded in the protections afforded.

(c) The law of this state contains similar protections for a person making a request for reasonable accommodation under the Pregnancy Disability Leave Law (Section 12945 of the Government Code) and the California Family Rights Act (Sections 12945.2 and 19702.3 of the Government Code). It is the intent of the Legislature for the protections afforded a person making a request for accommodation on the basis of religion or disability to be consistent with the provisions of the Fair Employment and Housing Act (Part 2.8 Commencing with Section 12900) of Division 3 of Title 2 of the Government Code.

(d) Notwithstanding any interpretation of this issue in *Rope v. Auto-Chlor Sys. of Washington, Inc.*, (2013) 220 Cal. App. 4th 635, the Legislature intends (1) to make clear that a request for reasonable accommodation on the basis of religion or disability is a protected activity, and (2) by enacting paragraph (2) of subdivision (m) and paragraph (4) of subdivision (l) of Section 12940, to provide protection against retaliation when an individual makes a request for reasonable accommodation under these sections, regardless of whether the request was granted. With the exception of its holding on this issue, *Rope v. Auto-Chlor Sys. of Washington, Inc.*, (2013) 220 Cal. App. 4th 635 remains good law.

SEC. 2. Section 12940 of the Government Code is amended to read:

12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based

1 upon applicable security regulations established by the United
2 States or the State of California:

3 (a) For an employer, because of the race, religious creed, color,
4 national origin, ancestry, physical disability, mental disability,
5 medical condition, genetic information, marital status, sex, gender,
6 gender identity, gender expression, age, sexual orientation, or
7 military and veteran status of any person, to refuse to hire or
8 employ the person or to refuse to select the person for a training
9 program leading to employment, or to bar or to discharge the
10 person from employment or from a training program leading to
11 employment, or to discriminate against the person in compensation
12 or in terms, conditions, or privileges of employment.

13 (1) This part does not prohibit an employer from refusing to
14 hire or discharging an employee with a physical or mental
15 disability, or subject an employer to any legal liability resulting
16 from the refusal to employ or the discharge of an employee with
17 a physical or mental disability, where the employee, because of
18 his or her physical or mental disability, is unable to perform his
19 or her essential duties even with reasonable accommodations, or
20 cannot perform those duties in a manner that would not endanger
21 his or her health or safety or the health or safety of others even
22 with reasonable accommodations.

23 (2) This part does not prohibit an employer from refusing to
24 hire or discharging an employee who, because of the employee's
25 medical condition, is unable to perform his or her essential duties
26 even with reasonable accommodations, or cannot perform those
27 duties in a manner that would not endanger the employee's health
28 or safety or the health or safety of others even with reasonable
29 accommodations. Nothing in this part shall subject an employer
30 to any legal liability resulting from the refusal to employ or the
31 discharge of an employee who, because of the employee's medical
32 condition, is unable to perform his or her essential duties, or cannot
33 perform those duties in a manner that would not endanger the
34 employee's health or safety or the health or safety of others even
35 with reasonable accommodations.

36 (3) Nothing in this part relating to discrimination on account of
37 marital status shall do either of the following:

38 (A) Affect the right of an employer to reasonably regulate, for
39 reasons of supervision, safety, security, or morale, the working of

1 spouses in the same department, division, or facility, consistent
2 with the rules and regulations adopted by the commission.

3 (B) Prohibit bona fide health plans from providing additional
4 or greater benefits to employees with dependents than to those
5 employees without or with fewer dependents.

6 (4) Nothing in this part relating to discrimination on account of
7 sex shall affect the right of an employer to use veteran status as a
8 factor in employee selection or to give special consideration to
9 Vietnam-era veterans.

10 (5) (A) This part does not prohibit an employer from refusing
11 to employ an individual because of his or her age if the law
12 compels or provides for that refusal. Promotions within the existing
13 staff, hiring or promotion on the basis of experience and training,
14 rehiring on the basis of seniority and prior service with the
15 employer, or hiring under an established recruiting program from
16 high schools, colleges, universities, or trade schools do not, in and
17 of themselves, constitute unlawful employment practices.

18 (B) The provisions of this part relating to discrimination on the
19 basis of age do not prohibit an employer from providing health
20 benefits or health care reimbursement plans to retired persons that
21 are altered, reduced, or eliminated when the person becomes
22 eligible for Medicare health benefits. This subparagraph applies
23 to all retiree health benefit plans and contractual provisions or
24 practices concerning retiree health benefits and health care
25 reimbursement plans in effect on or after January 1, 2011.

26 (b) For a labor organization, because of the race, religious creed,
27 color, national origin, ancestry, physical disability, mental
28 disability, medical condition, genetic information, marital status,
29 sex, gender, gender identity, gender expression, age, sexual
30 orientation, or military and veteran status of any person, to exclude,
31 expel, or restrict from its membership the person, or to provide
32 only second-class or segregated membership or to discriminate
33 against any person because of the race, religious creed, color,
34 national origin, ancestry, physical disability, mental disability,
35 medical condition, genetic information, marital status, sex, gender,
36 gender identity, gender expression, age, sexual orientation, or
37 military and veteran status of the person in the election of officers
38 of the labor organization or in the selection of the labor
39 organization's staff or to discriminate in any way against any of

1 its members or against any employer or against any person
2 employed by an employer.

3 (c) For any person to discriminate against any person in the
4 selection, termination, training, or other terms or treatment of that
5 person in any apprenticeship training program, any other training
6 program leading to employment, an unpaid internship, or another
7 limited duration program to provide unpaid work experience for
8 that person because of the race, religious creed, color, national
9 origin, ancestry, physical disability, mental disability, medical
10 condition, genetic information, marital status, sex, gender, gender
11 identity, gender expression, age, sexual orientation, or military
12 and veteran status of the person discriminated against.

13 (d) For any employer or employment agency to print or circulate
14 or cause to be printed or circulated any publication, or to make
15 any nonjob-related inquiry of an employee or applicant, either
16 verbal or through use of an application form, that expresses,
17 directly or indirectly, any limitation, specification, or discrimination
18 as to race, religious creed, color, national origin, ancestry, physical
19 disability, mental disability, medical condition, genetic information,
20 marital status, sex, gender, gender identity, gender expression,
21 age, sexual orientation, or military and veteran status, or any intent
22 to make any such limitation, specification, or discrimination. This
23 part does not prohibit an employer or employment agency from
24 inquiring into the age of an applicant, or from specifying age
25 limitations, where the law compels or provides for that action.

26 (e) (1) Except as provided in paragraph (2) or (3), for any
27 employer or employment agency to require any medical or
28 psychological examination of an applicant, to make any medical
29 or psychological inquiry of an applicant, to make any inquiry
30 whether an applicant has a mental disability or physical disability
31 or medical condition, or to make any inquiry regarding the nature
32 or severity of a physical disability, mental disability, or medical
33 condition.

34 (2) Notwithstanding paragraph (1), an employer or employment
35 agency may inquire into the ability of an applicant to perform
36 job-related functions and may respond to an applicant's request
37 for reasonable accommodation.

38 (3) Notwithstanding paragraph (1), an employer or employment
39 agency may require a medical or psychological examination or
40 make a medical or psychological inquiry of a job applicant after

1 an employment offer has been made but prior to the
2 commencement of employment duties, provided that the
3 examination or inquiry is job related and consistent with business
4 necessity and that all entering employees in the same job
5 classification are subject to the same examination or inquiry.

6 (f) (1) Except as provided in paragraph (2), for any employer
7 or employment agency to require any medical or psychological
8 examination of an employee, to make any medical or psychological
9 inquiry of an employee, to make any inquiry whether an employee
10 has a mental disability, physical disability, or medical condition,
11 or to make any inquiry regarding the nature or severity of a physical
12 disability, mental disability, or medical condition.

13 (2) Notwithstanding paragraph (1), an employer or employment
14 agency may require any examinations or inquiries that it can show
15 to be job related and consistent with business necessity. An
16 employer or employment agency may conduct voluntary medical
17 examinations, including voluntary medical histories, which are
18 part of an employee health program available to employees at that
19 worksite.

20 (g) For any employer, labor organization, or employment agency
21 to harass, discharge, expel, or otherwise discriminate against any
22 person because the person has made a report pursuant to Section
23 11161.8 of the Penal Code that prohibits retaliation against hospital
24 employees who report suspected patient abuse by health facilities
25 or community care facilities.

26 (h) For any employer, labor organization, employment agency,
27 or person to discharge, expel, or otherwise discriminate against
28 any person because the person has opposed any practices forbidden
29 under this part or because the person has filed a complaint, testified,
30 or assisted in any proceeding under this part.

31 (i) For any person to aid, abet, incite, compel, or coerce the
32 doing of any of the acts forbidden under this part, or to attempt to
33 do so.

34 (j) (1) For an employer, labor organization, employment agency,
35 apprenticeship training program or any training program leading
36 to employment, or any other person, because of race, religious
37 creed, color, national origin, ancestry, physical disability, mental
38 disability, medical condition, genetic information, marital status,
39 sex, gender, gender identity, gender expression, age, sexual
40 orientation, or military and veteran status, to harass an employee,

1 an applicant, an unpaid intern or volunteer, or a person providing
 2 services pursuant to a contract. Harassment of an employee, an
 3 applicant, an unpaid intern or volunteer, or a person providing
 4 services pursuant to a contract by an employee, other than an agent
 5 or supervisor, shall be unlawful if the entity, or its agents or
 6 supervisors, knows or should have known of this conduct and fails
 7 to take immediate and appropriate corrective action. An employer
 8 may also be responsible for the acts of nonemployees, with respect
 9 to sexual harassment of employees, applicants, unpaid interns or
 10 volunteers, or persons providing services pursuant to a contract in
 11 the workplace, where the employer, or its agents or supervisors,
 12 knows or should have known of the conduct and fails to take
 13 immediate and appropriate corrective action. In reviewing cases
 14 involving the acts of nonemployees, the extent of the employer's
 15 control and any other legal responsibility that the employer may
 16 have with respect to the conduct of those nonemployees shall be
 17 considered. An entity shall take all reasonable steps to prevent
 18 harassment from occurring. Loss of tangible job benefits shall not
 19 be necessary in order to establish harassment.

20 (2) The provisions of this subdivision are declaratory of existing
 21 law, except for the new duties imposed on employers with regard
 22 to harassment.

23 (3) An employee of an entity subject to this subdivision is
 24 personally liable for any harassment prohibited by this section that
 25 is perpetrated by the employee, regardless of whether the employer
 26 or covered entity knows or should have known of the conduct and
 27 fails to take immediate and appropriate corrective action.

28 (4) (A) For purposes of this subdivision only, "employer" means
 29 any person regularly employing one or more persons or regularly
 30 receiving the services of one or more persons providing services
 31 pursuant to a contract, or any person acting as an agent of an
 32 employer, directly or indirectly, the state, or any political or civil
 33 subdivision of the state, and cities. The definition of "employer"
 34 in subdivision (d) of Section 12926 applies to all provisions of this
 35 section other than this subdivision.

36 (B) Notwithstanding subparagraph (A), for purposes of this
 37 subdivision, "employer" does not include a religious association
 38 or corporation not organized for private profit, except as provided
 39 in Section 12926.2.

(C) For purposes of this subdivision, “harassment” because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

(5) For purposes of this subdivision, “a person providing services pursuant to a contract” means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer’s work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(l) (1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person’s religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for

1 travel prior and subsequent to a religious observance, and religious
2 dress practice and religious grooming practice as described in
3 subdivision (q) of Section 12926. This subdivision shall also apply
4 to an apprenticeship training program, an unpaid internship, and
5 any other program to provide unpaid experience for a person in
6 the workplace or industry.

7 (2) An accommodation of an individual's religious dress practice
8 or religious grooming practice is not reasonable if the
9 accommodation requires segregation of the individual from other
10 employees or the public.

11 (3) An accommodation is not required under this subdivision
12 if it would result in a violation of this part or any other law
13 prohibiting discrimination or protecting civil rights, including
14 subdivision (b) of Section 51 of the Civil Code and Section 11135
15 of this code.

16 (4) *For an employer or other entity covered by this part to, in*
17 *addition to the employee protections provided pursuant to*
18 *subdivision (h), retaliate or otherwise discriminate against a*
19 *person for requesting accommodation under this subdivision,*
20 *regardless of whether the request was granted.*

21 (m) (1) For an employer or other entity covered by this part
22 to fail to make reasonable accommodation for the known physical
23 or mental disability of an applicant or employee. Nothing in this
24 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
25 construed to require an accommodation that is demonstrated by
26 the employer or other covered entity to produce undue hardship,
27 as defined in subdivision (u) of Section 12926, to its operation.

28 (2) *For an employer or other entity covered by this part to, in*
29 *addition to the employee protections provided pursuant to*
30 *subdivision (h), retaliate or otherwise discriminate against a*
31 *person for requesting accommodation under this subdivision,*
32 *regardless of whether the request was granted.*

33 (n) For an employer or other entity covered by this part to fail
34 to engage in a timely, good faith, interactive process with the
35 employee or applicant to determine effective reasonable
36 accommodations, if any, in response to a request for reasonable
37 accommodation by an employee or applicant with a known physical
38 or mental disability or known medical condition.

1 (o) For an employer or other entity covered by this part, to
2 subject, directly or indirectly, any employee, applicant, or other
3 person to a test for the presence of a genetic characteristic.

4 (p) Nothing in this section shall be interpreted as preventing the
5 ability of employers to identify members of the military or veterans
6 for purposes of awarding a veteran's preference as permitted by
7 law.

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